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No. 82-2031

In the Supreme Court of the United States

OCTOBER TERM, 1983

GERALD WAYNE CASE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a reasonable expectation of privacy on the part of petitioners was violated when law enforcement officers observed the license plate of a jeep parked on property that was accessible to members of the public.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a-78a) is reported at 699 F.2d 18. The opinion of the district court relevant to the question presented by petitioners is not reprinted in the appendix to the petition but is reported at 509 F.Supp. 1376. An opinion of the district court unrelated to that issue (Pet. App. 1a-26a) is reported at 509 F.Supp. 1364.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1983. A petition for rehearing was denied on February 28, 1983. On April 22, 1983, Justice Brennan extended the time for filing a petition for a writ of certiorari to June 7, 1983. The petition was docketed on June 13, 1983, retroactive to June 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maine, petitioners were convicted of conspiracy to possess with intent to distribute and to import approximately 18.7 tons of marijuana, in violation of 21 U.S.C. 846 and 963.[1] Petitioners were sentenced to various terms of imprisonment and fines.[2] The court of appeals affirmed (Pet. App. 27a-78a).

1. The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. 33a-41a). On the morning of May 31, 1980, after a 24-hour chase on the high seas, a Canadian police vessel stopped a 65-foot Honduran shrimp boat, the Patricia, 65 miles southeast of Nova Scotia. Law enforcement officials had been notified of the Patricia's suspicious activity by the fishing ship O'hara. On board the Patricia the Canadian agents found co-defendant David Keith Hensel, a crew of eight Columbians, and 18.7 tons of marijuana. Three days later, Maine state police and federal Drug Enforcement Administration (DEA) agents raided the property on the coast of Maine where Hensel was to have delivered his cargo. At that time they arrested petitioners.

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[1]Petitioners and four other defendents were indicted on June 12, 1980. At a joint trial, seven were convicted and one was acquitted. The court of appeals affirmed the conviction of each of the seven defendants. See *United States* v. *Hensel*, 699 F.2d 18 (1st Cir. 1983) (Pet. App. 27a-78a). The petition for a writ of certiorari filed by co-defendant David Keith Hensel was denied on May 31, 1983 (No. 82-1782).

[2]The sentences are as follows: petitioner Case—five years' imprisonment and a $10,000 fine; petitioner Duke—five years' imprisonment and a $15,000 fine; petitioner Hubbard—five years' imprisonment and a $10,000 fine; and petitioner Standley—three years' imprisonment and a $5,000 fine.

With respect to petitioners, the record shows that the investigation into their activities on the Maine coast had begun approximately one month before the seizure of the Patricia. In late April 1980, agents of the DEA and the Maine state police learned that Lot No. 3 of the Turkey Cove subdivision in Tenant's Harbor, Maine, had been bought in the name of petitioner Duke's father for $170,000 in cash. The lot contained approximately three acres of relatively secluded land on the Maine coast. On it stood three wood-frame buildings, a wooden garage, and a deep-water dock that provided access to the Atlantic Ocean. A short driveway connected the buildings to a subdivision dirt road, which in turn led to a public highway.

The agents also learned that in late April co-defendant Craig Dill had bought a 32-foot sport-fishing boat, Sunshine, in petitioner Hubbard's name, and had paid for it with four checks totalling $30,000. Dill installed $8,000 worth of electronic equipment in the boat. Although Dill and an accomplice had told the sellers of the boat that they planned to take it to Massachusetts, agents later saw it at the Lot No. 3 dock. The agents also discovered that Dill had been convicted in 1974 in Venezuela of possessing 2½ kilograms of cocaine and had been sentenced to four years in prison.

On the basis of this information the DEA and the Maine police set up a surveillance program to monitor activity at the Turkey Cove property. Posts were established on properties adjacent to Lot No. 3 and across the St. George River. In addition, two or three times a week, aerial surveillance was conducted. During the day a telescope, a spotting scope, and binoculars were used to monitor the property; at night a nonmagnifying nightscope was employed. The agents could see people and vehicles on Lot No. 3, but they were unable to observe activities inside any of the buildings.

On several occasions in May the agents watched the Sunshine sail out to sea and return to the Lot No. 3 dock. The boat generally left in the afternoon and returned late at night, often without navigational lights. The agents also saw several vehicles on the property, including eight large-capacity cargo vans from out-of-state. Near the end of May they observed people reinforcing the dock, and they noticed that some of this work was being done at night by flashlight.

At about 11:30 p.m. on June 2 a state policeman at the observation post across the river saw the Sunshine return to Turkey Cove accompanied by a 60-70-foot boat. Although it was later learned that the Sunshine had run aground and was merely being towed home, the agents at the time suspected that this larger boat might be delivering a cargo of drugs. Accordingly, a DEA and a Maine police agent left their vantage point to scout the Turkey Cove property. At about 12:30 a.m. on June 3 they made their way down the subdivision access road and walked to the beach through the woods on the land adjacent to Lot No. 3. They then followed the beach toward Lot No. 3 until they reached a spot where debris blocked their way. Both agents waded through waist-high water around the debris in order to approach the dock. From this position they saw several people board the larger boat. However, no one unloaded it, and at about 3:00 a.m. that boat left.

After concluding that the departing boat had not delivered drugs, the agents decided to leave Turkey Cove. Rather than return through the deep water, they followed a route across Lot No. 3 that they believed was the most direct course back to the public highway. While walking along the Lot No. 3 driveway, they passed a tan jeep and recorded its license number.

Through a check of the license number later that day, the agents discovered that the jeep was owned by co-defendant John Wells. A DEA agent then located Wells' telephone number and found that it was (with the exception of two digits that had been transposed) one of three phone numbers co-defendant Hensel had given to the O'hara on May 30.

At approximately 4:30 p.m. on June 3, the agents monitoring Turkey Cove learned that Hensel had been deported from Canada and arrested at Boston's Logan airport. They also learned that Hensel had telephoned an attorney in Boston and had told him to call a certain woman who "would know who to call and know what to do." Concerned that Hensel's acquaintance might have relayed the news of the seizure of the Patricia to those at Turkey Cove, the agents decided to move to a closer vantage point and, if appropriate, to make arrests.

At about 7:15 p.m., a DEA agent saw the tan jeep leave Lot No. 3. He stopped the jeep on the public highway. Petitioner Case climbed out of the jeep and asked if something was wrong. The agent identified himself as a narcotics officer. In addition, the agent observed petitioner Hubbard crouched in his seat in the jeep. The agent opened the door and asked Hubbard to step out. Inside the vehicle the agent saw a CB radio with a 12-volt battery and an antenna. Case and Hubbard were then arrested.

Concerned that petitioner Hubbard might have used the CB radio in the jeep to alert his accomplices at Turkey Cove, the police decided to raid Lot No. 3 in order to prevent those present from escaping or destroying evidence. Petitioner Standley was arrested by the boathouse. In the main house the officers found petitioner Duke writing on sheets of paper at a desk. The papers and a nearby yellow pad were seized. The agents also found $2,000 in cash in petitioner Duke's desk and $44,000 in an open briefcase.

ARGUMENT

Petitioners claim (Pet. 9-13) that the agents' observation of the license plate on the jeep parked at Lot No. 3 violated their reasonable expectation of privacy under the Fourth Amendment and therefore that all evidence obtained as a result of investigating the license number should have been suppressed. The court below correctly rejected this claim in light of the particular circumstances presented here, and further review of this issue is not warranted.

As the court of appeals stated (Pet. App. 57a), "the driveway to Lot No. 3 is not quite so nestled in the 'middle of nowhere' as [petitioners] would have us believe." Rather, houses and farms are scattered every few hundred yards along the public highway, which runs within one-quarter to one-half mile of the buildings on Lot No. 3. Other cabins also had been built along the coast (*ibid.*).

Moreover, the subdivision road extending three-quarters of the distance between Lot No. 3 and the highway was "a semi-public road * * * open to people other than the owners and users of Lot No. 3" (Pet. App. 57a-58a). In addition, members of the public generally used the beach as well as a wooded area on Lot No. 3. And the fence around the property and all but one of the "no trespassing" signs that petitioners rely upon to support their Fourth Amendment claim (Pet. 12) were shown by the government's evidence to have been installed subsequent to the June 3 raid (Pet. App. 58a).[3] In light of this access and use by the public, petitioners have failed to establish a reasonable expectation of privacy in the driveway area on Lot No. 3. *United States* v. *Salvucci*, 448 U.S. 83, 91-92 (1980); *Rawlings* v. *Kentucky*,

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[3]At all events, the posting of a sign, without more, hardly confers an expectation of privacy when the property continues to be crossed by members of the public. *United States* v. *Edmonds*, 611 F.2d 1386, 1388 (5th Cir. 1980).

448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978).[4]

Nor do petitioners have any privacy interest in the license plate on the jeep belonging to co-defendant Wells (Pet. App. 56a). On the contrary, a license plate is "normally revealed to the public" and "is designed for public exposure" (*ibid.*). Indeed, precisely in order to aid law enforcement and to facilitate identification of the vehicle and its owner, a vehicle is generally required by law to carry a license plate and to display it in a way that is visible at all times (see 509 F.Supp. at 1386). Thus, in fact, the license number of the jeep could well have been observed by the officers whenever the jeep was on a public thoroughfare.

Finally, contrary to petitioners' suggestion (Pet. 6-7), there is no indication of bad faith on the part of the officers in cutting across Lot No. 3 to get from the beach to the public highway. Rather than wading back through the waist-deep water during high tide (Pet. App. 39a; 509 F.Supp. at 1381), the officers decided to follow, as the district court specifically found (*ibid.*), "what they believed to be the most direct route * * * along the driveway on Lot

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[4]In contrast to *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), upon which petitioners heavily rely (Pet. 9-10, 13, 19), neither the identity of the people who had access to and used Lot No. 3, nor the conditions and circumstances of such access and use, were controlled by or even known to petitioners. Likewise, the court of appeals decisions cited by petitioners (Pet. 13-20) involving the doctrine of curtilage are inapposite here, since they are premised on a reasonable expectation of privacy that is lacking in this case. Finally, because the court below rested its decision on the absence of a privacy interest and did not invoke the "open fields" doctrine, and because it correctly distinguished (Pet. App. 59a) the decision in *United States* v. *Oliver*, 657 F.2d 85 (6th Cir. 1981), we agree with petitioners (Pet. 14 n.3) that this case need not be held pending the Court's decision in *Oliver*, cert. granted, No. 82-15 (Jan. 24, 1983).

No. 3 to the common access road and thence to [the highway]." Furthermore, "the agents * * * were unfamiliar with the area and * * * were not aware of * * * alternative means of egress" (*id.* at 1381 n.6). In these circumstances, it was not unreasonable for the officers to proceed through Lot No. 3.

In summary, this case presents nothing more than a fact-specific issue turning upon the particular characteristics of the property in question, and the decision of the court of appeals presents no question of general importance or clearcut error justifying the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

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